

STANLEY G. WEST

IBLA 74-71

Decided November 28, 1973

Appeal from decision 9181 (420), Group 568, Montana, dated July 25, 1973, by the Director, Bureau of Land Management, dismissing a protest against acceptance of plat of survey of an island in the Yellowstone River, in section 33, T. 1 S., R. 10 E., P.M., Montana.

Hearing ordered.

Secretary of the Interior--Surveys of Public Lands:

Generally--Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands require extension or correction of surveys of the public lands as may be necessary, including the surveying of lands omitted from earlier surveys.

Hearings--Surveys of Public Lands: Generally

Where one who protests the performance and acceptance of a survey of land, identified by the cadastral engineer making the survey as public domain land, offers probative evidence that the land is not in fact federally-owned, a hearing will be ordered to receive and consider such evidence and to ascertain the facts.

APPEARANCES: Joseph T. Swindlehurst, Esq., of Huppert & Swindlehurst, P.C., Livingston, Montana, for appellant.

OPINION BY MR. HENRIQUES

Stanley G. West has appealed from a decision of the Director, Bureau of Land Management, signed by the Chief, Division of

Cadastral Survey, dated July 25, 1973, dismissing his protest against the public land survey of an island in the Yellowstone River situated in section 33, T. 1 S., R. 10 E., P.M., Montana. The decision found that the island was unsurveyed land and in existence in 1889, when Montana was admitted as a State, and that the island is therefore public land.

The Secretary of the Interior has the authority and duty to determine what lands are public lands, what public lands have been or should be surveyed, and what surveys of the public lands should be extended or corrected, as necessary, to include lands omitted from earlier surveys. Utah Power & Light Company, 6 IBLA 79, 79 I.D. 397 (1972); Burt A. Wackerli, 73 I.D. 280 (1966). ^{1/} See Kirwan v. Murphy, 189 U.S. 35 (1903).

The appellant admits that the land was in existence in 1889, but contends that it was not then an island, but rather was attached to the north bank of the Yellowstone River, and did not become an island until the late 1940's. Appellant has submitted a number of affidavits in support of his contention.

In light of the factual situation presented, we believe a hearing is appropriate ^{2/} for presentation of evidence on the issue:

Were the lands in issue part of the fixed uplands forming the north bank of the Yellowstone River on November 8, 1889, the date that Montana was admitted into the Union as a State?

The appellant will bear the risk of nonpersuasion that the BLM determination is erroneous.

We note that the State of Montana had also protested the proposed survey to the Director, Bureau of Land Management, but has not pursued an appeal to this Board. Should the State desire to participate in the hearing as a party, it may so petition the presiding Administrative Law Judge.

^{1/} The Wackerli decision has been challenged in Wackerli v. Morton, Civil 1-66-92, in the United States District Court for the District of Idaho. The case involves the survey of omitted lands along the Snake River in Idaho.

^{2/} 43 CFR 4.415.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is remanded to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge, who shall submit a recommended decision to this Board, and afford the parties an opportunity to file briefs with this Board after the rendition of his recommended decision.

Douglas E. Henriques, Member

We concur:

Edward W. Stuebing, Member

Joseph W. Goss, Member

